

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ADRISH BANERJEE, an individual, and
YAN HE, an individual,

Plaintiff(s),

v.

CONTINENTAL INCORPORATED, INC.,
et al.,

Defendant(s).

Case No. 2:16-CV-669 JCM (VCF)

ORDER

Presently before the court is defendants Continental Incorporated, Inc.'s and Leapers, Inc.'s motion to dismiss. (ECF No. 24). Plaintiffs Adrish Banerjee and Yan He filed a response (ECF No. 37), to which defendants replied (ECF No. 38).

I. Facts

Plaintiffs are online retailers of outdoor products, including rifle scopes bearing the "SNIPER" trademark. (ECF No. 20). Defendant Leapers, Inc. ("Leapers") manufactures rifle scopes, to which it claims intellectual property rights. (ECF No. 20). Defendant Continental Incorporated, Inc. ("Continental") is a private investigation firm. (ECF No. 20).

Suspecting that plaintiffs were infringing on its trademark, Leapers hired Continental to investigate the alleged infringement in 2014. (ECF No. 20). As part of the investigation, Continental made two purchase orders online for rifle scopes from plaintiffs in July and August of 2014. (ECF No. 20). Later, in early September 2014, Continental made another rifle scope purchase from plaintiffs at a Las Vegas gun show and expressed an interest in becoming plaintiffs' dealer in Indiana. (ECF No. 20).

1 Subsequently, defendants met with a detective from the Vanderburgh County sheriff's
 2 office to examine the rifle scopes purchased from plaintiffs, during which the rifles were deemed
 3 counterfeits. (ECF No. 20). The Vanderburgh County superior court issued a warrant for the
 4 arrest of plaintiffs in December 2014, based on the detective's affidavit of probable cause. (ECF
 5 No. 20).

6 In February 2015, Las Vegas Metropolitan Police Department ("LVMPD") arrested
 7 plaintiffs at another Las Vegas area gun show pursuant to the arrest warrant. (ECF No. 20).
 8 Plaintiffs were held for approximately one week before being freed on bond. (ECF No. 20).

9 Later, in March 2015, the governor of Indiana issued an executive warrant, which
 10 empowered law enforcement to arrest and transport plaintiffs to Indiana. (ECF No. 20). In April
 11 2015, LVMPD arrested plaintiffs at their home. (ECF No. 20). In May 2015, plaintiffs were
 12 transported to Indiana, wherein they were released on their own recognizance. (ECF No. 20). In
 13 August 2015, the Vanderburgh County district attorney dismissed all charges against plaintiffs.
 14 (ECF No. 20).

15 On February 24, 2016, plaintiffs filed the instant complaint in state court. (ECF No. 1).
 16 Defendants removed the case to this court on March 28, 2016. (ECF No. 1). On May 9, 2016,
 17 plaintiff filed their first amended complaint. (ECF No. 20).

18 In their first amended complaint, plaintiffs allege fourteen causes of action: (1)
 19 constitutional rights violation under 42 U.S.C. § 1983; (2) abuse of process; (3) false
 20 imprisonment; (4) defamation; (5) intentional infliction of emotional distress; (6) civil conspiracy;
 21 (7) negligence; (8) malicious prosecution under 42 U.S.C. § 1983; (9) malicious prosecution under
 22 common law; (10) Racketeer Influenced and Corrupt Organizations Act ("RICO") under 18 U.S.C.
 23 § 1964; (11) RICO under NRS 207.470; (12) tortious placing in false light; (13) interference with
 24 prospective economic advantage; and (14) *respondeat superior* liability of Leapers. (ECF No. 20).

25 In the instant motion, defendants move to dismiss all fourteen (14) claims for failure to
 26 state a claim. (ECF No. 24). The court will address each in turn.

27 . . .

28 . . .

II. Legal Standard

A court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

“Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. 662, 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that

are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

III. Discussion

A. Constitutional violation under 42 U.S.C. § 1983

In the instant motion, defendants argue that plaintiffs failed to allege any conduct by defendants that would constitute state action to support a § 1983 claim. (ECF No. 24 at 4). In particular, defendants contend that plaintiffs merely alleged that defendants provided information about their whereabouts to federal/state actors. (ECF No. 24 at 6). Defendants maintain that providing information to government actors does not constitute state action even if the information provided was false and relied upon in making the decision to arrest plaintiffs. (ECF No. 24 at 6). The court agrees.

Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. “To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law.” *Long v. Cnty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006).

In certain circumstances, a plaintiff may bring a § 1983 action against a private party based on a violation of a constitutional right. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980) (recognizing suit for a private party’s violation of another’s Fourth Amendment rights); *Brunette v. Humane Soc’y of Ventura Cnty.*, 294 F.3d 1205, 1209 (9th Cir.), *as amended on denial of reh’g & reh’g en banc* (Aug. 23, 2002). Specifically, “[s]ection 1983 liability extends to a private party where the private party engaged in state action under color of law and thereby deprived a plaintiff of some right, privilege, or immunity protected by the Constitution or the laws of the United States.” *Brunette*, 294 F.3d at 1209.

“Whether a private party engaged in state action is a highly factual question.” *Id.* Nevertheless, “private parties are not generally acting under color of state law.” *Price v. State of*

1 *Hawaii*, 939 F.2d 702, 707–08 (9th Cir. 1991). Further, “[c]onclusionary allegations, unsupported
 2 by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act.” *Id.* at 708
 3 (quoting *Jones v. Cmty. Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984)).

4 A person may become a state actor by conspiring with a state official, or by
 5 engaging in joint activity with state officials. A person may also become a state
 6 actor by becoming so closely related to the State that the person’s actions can be
 7 said to be those of the State itself. That might be found because the nexus is so
 close as to cause the relationship to be symbiotic. It might also be for such other
 reasons as performing public functions or being regulated to the point that the
 conduct in question is practically compelled by the State.

8 *Id.* at 708–09 (citations omitted).

9 Plaintiffs allege that defendants were state actors because they conspired or acted in concert
 10 with the Vanderburgh County prosecutor and sheriff’s office under color of law. (ECF No. 20 at
 11 8). Specifically, plaintiffs assert that defendants provided state agents with the false
 12 representations that formed the basis of the probable cause affidavit for plaintiffs’ arrests. (ECF
 13 No. 20 at 8). Plaintiff maintains that these acts resulted in the violation of their constitutional right
 14 against unreasonable searches and seizures. (ECF No. 20 at 8–9).

15 “But the mere furnishing of information to police officers does not constitute joint action
 16 under color of state law which renders a private citizen liable under § 1983.” *Lockhead v.*
 17 *Weinstein*, 24 F. App’x 805, 806 (9th Cir. 2001) (citing *Benavidez v. Gunnell*, 722 F.2d 615, 618
 18 (10th Cir. 1983); *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 327 (7th Cir. 1978)). “[A]
 19 relationship of cause and effect between the complaint and the prosecution is not sufficient, or
 20 every citizen who complained to a prosecutor would find himself in a conspiracy.” *Radcliffe v.*
 21 *Rainbow Constr. Co.*, 254 F.3d 772, 783 (9th Cir. 2001) (citing *United Steelworkers v. Phelps*
 22 *Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir. 1989)).

23 The amended complaint merely alleges defendants knowingly provided state officials with
 24 false information, which alone is insufficient to support that defendants acted under color of law.
 25 Plaintiffs do not allege that defendants had any control over the state officials, nor do they allege
 26 that defendants had any involvement in their arrests or detention other than providing information.
 27 Further, plaintiffs do not allege any agreements existed between defendants and the state officials
 28 to support their allegation of conspiracy. While plaintiffs repeatedly assert that defendants

1 conspired with state officials, they nonetheless failed to set forth sufficient facts to support their
2 allegation that defendants were private parties acting under color of law.

3 Accordingly, defendants' motion to dismiss will be granted as to this claim.

4 **B. Abuse of process**

5 Plaintiffs allege that Leapers initiated the investigation that lead to their false arrest to harm
6 plaintiffs and their business. (ECF No. 20 at 9–10).

7 In their motion, defendants contend plaintiffs fail to state a claim for abuse of process
8 because they failed to allege that defendants engaged in improper use of process. (ECF No. 24 at
9 8–9). The court agrees.

10 An abuse of process claim requires two elements: “(1) an ulterior purpose by the defendants
11 other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper
12 in the regular conduct of the proceeding.” *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002)
13 (quoting *Posadas v. City of Reno*, 851 P.2d 438, 444–45 (Nev. 1993)) (internal quotation marks
14 omitted). Importantly, “[t]he utilized process must be judicial, as the tort protects the integrity of
15 the court.” *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 519 (Nev.), *reh’g denied*
16 (Nov. 24, 2015), *reconsideration en banc denied* (Jan. 22, 2016).

17 Here, the amended complaint contains no allegations as to defendants' use of the legal
18 process. While plaintiffs allege that they were charged, those charges were brought by the state,
19 not defendants as they lack the authority to do so. Thus, plaintiffs have failed to state a claim for
20 abuse of process against defendants.

21 Accordingly, defendants' motion to dismiss will be granted as to this claim.

22 **C. False imprisonment**

23 In their amended complaint, plaintiffs allege defendants provided the sheriff's office with
24 false information and allegations that plaintiffs manufactured and distributed counterfeit rifle
25 scopes. (ECF No. 20 at 4–5). Plaintiffs assert that they were unlawfully arrested and detained as
26 a result of the falsely provided information. (ECF No. 20 at 12).

1 In the instant motion, defendants argue that the false imprisonment claim fails because
 2 plaintiffs failed to allege that defendants themselves detained plaintiffs or actually participated in
 3 their arrests. (ECF No. 24 at 10). The court agrees.

4 Under Nevada law, an individual is liable for the tort of false imprisonment “if (a) he acts
 5 intending to confine the other or a third person within boundaries fixed by the actor, and (b) his
 6 act directly or indirectly results in such a confinement of the other, and (c) the other is conscious
 7 of the confinement or is harmed by it.” *Hernandez v. City of Reno*, 634 P.2d 668, 671 (Nev. 1981)
 8 (quoting Restatement (Second) of Torts § 35 (1965)).

9 Here, plaintiffs allege that they were arrested by LVMPD, held at the Las Vegas Detention
 10 Center, and transported to the custody of the Vanderburgh County sheriff’s office. (ECF No. 20
 11 at 7–8). The amended complaint contains no allegations that defendants intended to confine
 12 plaintiffs within boundaries fixed by the defendants. Thus, plaintiffs have failed to sufficiently
 13 state a false imprisonment claim against defendants to withstand dismissal.

14 Accordingly, defendants’ motion to dismiss will be granted as to this claim.

15 **D. Defamation**

16 Plaintiffs allege that defendants knowingly provided false statements regarding plaintiffs’
 17 alleged criminal conduct to the sheriff’s office to intentionally harm their reputation and good
 18 name. (ECF No. 20 at 12). Plaintiffs claim that these “false and defamatory statements were
 19 published in the warrant of probable cause affidavit and ultimately caused . . . substantial emotional
 20 and reputational injury to [p]laintiffs and their business.” (ECF No. 20 at 12).

21 A claim for defamation requires four elements: “(1) a false and defamatory statement of
 22 fact by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3)
 23 fault, amounting to at least negligence; and (4) actual or presumed damages.” *Pope v. Motel 6*,
 24 114 P.3d 277, 282 (Nev. 2005).

25 A statement is defamatory when, “[u]nder any reasonable definition[,] such charges would
 26 tend to lower the subject in the estimation of the community and to excite derogatory opinions
 27 against him and to hold him up to contempt.” *Las Vegas Sun v. Franklin*, 329 P.2d 867, 869 (Nev.
 28 1958). “A defamatory statement is actionable only if it has been published.” *M&R Investment*

1 *Co. v. Mandarino*, 748 P.2d 488, 491 (Nev. 1987). “Publication . . . is the communication of the
2 defamatory matter to some third person.” *Jones v. Golden Spike Corp.*, 623 P.2d 970, 971 (Nev.
3 1981).

4 Here, plaintiffs allege that defendants knowingly provided false information to the sheriff’s
5 office. (ECF No. 20 at 12). Accordingly to plaintiffs, defendants claimed that plaintiffs
6 manufactured and sold counterfeit rifle scopes and that the rifle scopes they purchased from
7 plaintiffs were counterfeit. (ECF No. 20 at 4–5).

8 However, the amended complaint sets forth no facts in support of plaintiffs’ allegation that
9 defendants’ statements were false. Rather, plaintiffs merely assert that “the statement that
10 [p]laintiffs’ products were ‘counterfeit’ was a false and misleading statement to the police”
11 because defendants failed to disclose that Leapers allegedly owned no registered trademarks.
12 (ECF No. 20 at 5).

13 Importantly, plaintiffs do not assert that their rifle scopes were in fact legitimate, nor do
14 they dispute that the scopes were counterfeit. Thus, plaintiffs failed to state sufficient facts to
15 support their allegation that defendants statements were false to withstand a motion to dismiss.

16 Accordingly, defendants’ motion to dismiss will be granted as to this claim.

17 **E. Intentional infliction of emotional distress**

18 To establish a claim of intentional infliction of emotional distress (“IIED”), plaintiffs must
19 plead and prove three elements: (1) defendants engaged in “extreme and outrageous conduct with
20 either the intention of, or reckless disregard for, causing emotional distress; (2) plaintiffs suffered
21 severe or extreme emotional distress; and (3) actual or proximate causation. *Posadas v. City of*
22 *Reno*, 851 P.2d 438, 444 (Nev. 1993); *see also Star v. Rabello*, 625 P.2d 90, 91–92 (Nev. 1981).

23 Plaintiffs allege that defendants intended to inflict severe emotional distress on them by
24 “knowingly and maliciously accus[ing] [p]laintiffs of crimes they did not commit,” causing
25 plaintiffs’ arrests in front of colleagues and potential customers. (ECF No. 20 at 13). According
26 to plaintiffs, they “experienced severe emotional distress, including substantial embarrassment,
27 undeserved humiliation and fear” as a result of the false arrest orchestrated by defendants. (ECF
28 No. 20 at 14).

1 In the instant motion, defendants argue that intentionally providing false information to
 2 law enforcement does not meet the stringent standard for “extreme and outrageous conduct.” (ECF
 3 No. 24 at 12). Moreover, defendants contend that plaintiffs failed to allege facts to support that
 4 they suffered severe emotional distress. (ECF No. 24 at 13). The court agrees.

5 The court determines whether a defendant’s conduct may be regarded as extreme and
 6 outrageous so as to permit recovery; but, where reasonable people may differ, the jury determines
 7 whether the conduct was extreme and outrageous enough to result in liability. *See Chehade Refai*
 8 *v. Lazaro*, 614 F. Supp. 2d 1103, 1121 (D. Nev. 2009); *Norman v. Gen. Motors Corp.*, 628 F.
 9 Supp. 702, 704–05 (D. Nev. 1986) (considering “totality of the circumstances” in determining
 10 whether conduct is extreme and outrageous).

11 Under Nevada law, “extreme and outrageous conduct is that which is outside all possible
 12 bounds of decency and is regarded as utterly intolerable in a civilized community”; however, this
 13 description does not encompass acts which are merely “inconsiderate” or “unkind.” *Maduike v.*
 14 *Agency Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998). Liability does not extend “to mere insults,
 15 indignities, threats, annoyances, petty oppressions, or other trivialities.” Restatement (Second) of
 16 Torts § 46, cmt. d.

17 Nevada courts refer to the Restatement (Second) of Torts § 46 Torts for guidance in
 18 interpreting IIED claims. *See, e.g., Olivero v. Lowe*, 995 P.2d 1023, 1027 (Nev. 2000); *Selsnick*
 19 *v. Horton*, 620 P.2d 1256, 1257 (Nev. 1980). Extreme and outrageous conduct may arise “from
 20 the actor’s knowledge that the other is peculiarly susceptible to emotional distress, by reason of
 21 some physical or mental condition or peculiarity.” Restatement (Second) of Torts § 46 cmt. f.
 22 “[H]owever, . . . major outrage is essential to the tort; and the mere fact that the actor knows that
 23 the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.” *Id.*
 24 Extreme and outrageous conduct also “may arise from an abuse by the actor of a position, or a
 25 relation with the other, which gives him actual or apparent authority over the other, or power to
 26 affect his interests.” *Id.* cmt. e (stating as an example that police officers have been held liable for
 27 extreme abuse of their position).
 28

1 Here, plaintiffs have failed to sufficient state a claim for IIED against defendants. Plaintiffs
 2 failed to state sufficient facts to support their allegations that defendants' statements were in fact
 3 false or claim that their rifle scopes were not counterfeit. Further, plaintiffs failed to state sufficient
 4 facts to support their allegation that they suffered severe emotional distress.

5 Accordingly, defendants' motion to dismiss will be granted as to this claim.

6 **F. Civil conspiracy**

7 Plaintiffs allege that defendants acted in concert "to accomplish the unlawful objective of
 8 damaging [p]laintiffs' professional reputation, harming competitors and forcing [p]laintiffs out of
 9 business." (ECF No. 20 at 14). Plaintiffs further assert that defendants agreed to harm plaintiffs
 10 by "creative use" of Indiana statutes. (ECF No. 20 at 14).

11 In the instant motion, defendants argue that plaintiffs fail to state a claim for civil
 12 conspiracy as they failed to specifically allege an underlying tort. (ECF No. 24 at 15). The court
 13 agrees.

14 Civil conspiracy is a Nevada state law claim that "consists of a combination of two or more
 15 persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose
 16 of harming another, and damage results from the act or acts." *Consol.-Generator Nev., Inc. v.*
 17 *Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998).

18 To state a claim for civil conspiracy, plaintiffs must allege two elements: (1) the
 19 commission of an underlying tort; and (2) an agreement between the defendants to commit that
 20 tort. *GES, Inc. v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Further, in pleading a claim for civil
 21 conspiracy, plaintiffs must plead with particular specificity as to "the manner in which a defendant
 22 joined in the conspiracy and how he participated in it." *Arroyo v. Wheat*, 591 F. Supp. 141, 144
 23 (D. Nev. 1984).

24 Here, plaintiffs have failed to sufficiently plead a claim for civil conspiracy with the
 25 requisite specificity. While plaintiffs allege that Leapers hired Continental to investigate plaintiffs'
 26 infringement, they have failed to specifically allege an underlying tort and that defendants had an
 27 agreement to commit that tort.

28 Accordingly, defendants' motion to dismiss will be granted as to this claim.

1 **G. Negligence against defendant Continental**

2 Plaintiffs allege that defendant Continental had a duty to exercise reasonable care in
3 reporting solely true and accurate information to law enforcement, that Continental breached this
4 duty by providing “inaccurate and/or invalid information” to law enforcement, and that defendants
5 negligently caused injuries to plaintiffs. (ECF No. 20 at 15).

6 To prevail on a claim for negligence, a plaintiff must generally show four elements: (1)
7 defendant owed a duty of care to plaintiff; (2) defendant breached that duty; (3) the breach was the
8 legal cause of plaintiff’s injury; and (4) plaintiff suffered damages. *Scialabba v. Brandise Constr.*
9 *Co., Inc.*, 921 P.2d 928, 930 (Nev. 1996).

10 “Whether a defendant owes a plaintiff a duty of care is a question of law.” *Harrington v.*
11 *Syufy Enters.*, 931 P.2d 1378, 1381 (Nev. 1997). “A duty in tort owing from a defendant to a
12 plaintiff can be created by law, by a defendant’s assumption of that duty, or by a preexisting
13 relationship between the plaintiff and the defendant.” *Jacobsen v. Marin Gen. Hosp.*, 192 F.3d
14 881, 885 (9th Cir. 1999).

15 Here, plaintiffs have failed to sufficiently allege that defendants owed plaintiffs a duty of
16 care. In particular, plaintiffs failed to allege that Continental assumed a duty created by law or
17 that it had a preexisting relationship with plaintiffs.

18 Accordingly, defendants’ motion to dismiss will be granted as to this claim.

19 **H. Malicious prosecution under 42 U.S.C. § 1983 & under common law**

20 To plead a claim for malicious prosecution under Nevada law, plaintiffs must allege facts
21 from which the court may infer four elements: (1) defendants lacked probable cause to initiate the
22 prosecution, (2) malice, (3) the prior criminal proceedings were terminated in their favor, and (4)
23 plaintiffs suffered damages. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir.), *as*
24 *amended on denial of reh’g & reh’g en banc* (Dec. 29, 1995) (internal citations omitted).

25 A claim for malicious prosecution under § 1983 requires plaintiffs to allege these elements
26 plus the additional element that defendants prosecuted them “for the purpose of denying [them]
27 equal protection or another specific constitutional right.” *LaMantia v. Redisi*, 38 P.3d 877, 888
28 (Nev. 2002) (internal citation omitted).

1 “Malicious prosecution, by itself, does not constitute a due process violation.” *Freeman*,
2 68 F.3d at 1189. Thus, to prevail, plaintiffs must show that defendants prosecuted them with
3 malice and without probable cause, and that they did so for the purpose of denying them their equal
4 protection or other specific constitutional right. *See id.*

5 Here, plaintiffs’ claims for malicious prosecution under § 1983 and common law fail for
6 several reasons. While plaintiffs allege that the charges against them were dismissed, the mere
7 fact that a prosecution was unsuccessful does not mean it was not supported by probable cause.
8 *See id.* Plaintiffs do not allege that probable cause was lacking, but merely that defendants
9 knowingly provided false information to the sheriff’s office, which formed the basis of the
10 probable cause affidavit. Plaintiffs do not allege that the probable cause affidavit was based solely
11 on defendants’ allegedly false information or that detectives did not conduct any individual
12 investigation. Further, defendants did not prosecute plaintiffs, nor did they have the authority to
13 do so.

14 Accordingly, defendants’ motion to dismiss will be granted as to plaintiffs’ malicious
15 prosecution claims.

16 **I. RICO under 18 U.S.C. § 1964**

17 Plaintiffs allege that at Leapers direction, Continental sent letters to plaintiffs’ customers,
18 on at least two occasions, demanding payment and threatening criminal prosecution regarding their
19 sales of plaintiffs’ merchandise. (ECF No. 20 at 18). According to the amended complaint, these
20 letters contained fraudulent statements and Continental sent the letters interstate through the U.S.
21 mail so as to constitute mail fraud pursuant to 18 U.S.C. § 1341. (ECF No. 20 at 18). Plaintiff
22 asserts that the predicate acts have injured their business and property, including loss of customers
23 and trade. (ECF No. 20 at 18).

24 In the instant motion, defendants argue that the federal RICO claim fails for failure to
25 sufficiently plead a racketeering activity. (ECF No. 24 at 18). In particular, defendants contend
26 that plaintiffs failed to allege the identities of the sender and recipients of the letters, the dates on
27 which the letters were sent, and the substance of the letters. (ECF No. 24 at 19). The court agrees.

1 To plead a federal civil RICO claim, a plaintiff must demonstrate five elements: “(1)
2 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate
3 acts’) (5) causing injury to plaintiff’s ‘business or property.’” *Living Designs, Inc. v. E.I. Dupont*
4 *de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005); *see also* 18 U.S.C. § 1964(c).

5 “Racketeering activity” includes a variety of specified federal crimes, including mail and
6 wire fraud. 18 U.S.C. § 1961(1)(B). To state the elements of wire or mail fraud, plaintiffs must
7 allege three elements: (1) defendants formed a scheme or artifice to defraud; (2) defendants used
8 the mails or wires in furtherance of the scheme; and (3) defendants acted with the specific intent
9 to deceive or defraud. *See Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004);
10 *United States v. Manion*, 339 F.3d 1153, 1156 (9th Cir. 2003).

11 Further, because RICO claims involve underlying fraudulent acts, Federal Rule of Civil
12 Procedure 9(b)’s heightened pleading standard applies. *Edwards v. Marin Park, Inc.*, 356 F.3d
13 1058, 1065–66 (9th Cir. 2004); *see also* Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party
14 must state with particularity the circumstances constituting fraud or mistake.”).

15 Thus, to sufficiently plead their federal RICO claim, plaintiffs must specify the time, place,
16 and content of the alleged underlying fraudulent acts, as well as the parties involved and their
17 individual participation. *Edwards*, 356 F.3d at 1066; *see also Moore v. Kayport Package Express,*
18 *Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (racketeering allegations under § 1962(c) must identify the
19 time, place, and manner of each fraud plus the role of each defendant in the scheme).

20 Here, plaintiffs have failed to state facts as to the time, place, and content of the letters.
21 Further, plaintiffs have failed to specify the recipients of the letters. Furthermore, plaintiffs have
22 failed to allege facts sufficient to support their claim that they lost customers as a result.

23 Accordingly, defendants’ motion to dismiss will be granted as to this claim.

24 **J. RICO under NRS 207.470**

25 “Nevada courts have interpreted the state RICO statute consistently with the provisions of
26 federal RICO.” *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 71 (9th Cir. 1994) (citing *Allum v. Valley*
27 *Bank of Nev.*, 849 P.2d 297, 298 n.2 (Nev.) (“Nevada’s racketeering statutes ... are patterned after
28

the federal [RICO] statutes”), *cert. denied*, 510 U.S. 857 (1993)). Thus, the court adopts its analysis of the federal RICO claim.

Accordingly, defendants’ motion to dismiss will be granted as to this claim as well.

K. Tortious placing in false light

In order to prevail on this claim, plaintiffs must demonstrate three elements: (1) defendants gave publicity to a matter concerning plaintiffs that placed them before the public in a false light; (2) that the false light would be highly offensive to a reasonable person; and (3) defendants had knowledge of, or acted in recklessly disregard as to, the falsity of the publicized matter and the false light in which plaintiffs would be placed. *See, e.g., Barket v. Clarke*, No. 2:12-CV-393 JCM GWF, 2012 WL 2499359, at *5 (D. Nev. June 26, 2012).

Plaintiffs’ false light invasion of privacy claim is premised on their public arrest at the Las Vegas gun show, which defendants allegedly caused, and the “extortionate letters” Continental allegedly sent to their customers. (ECF No. 20 at 20). Plaintiffs assert that defendants’ conduct placed them in a false light to third parties, causing loss of business income and severe emotional distress. (ECF No. 20 at 20).

The Supreme Court of Nevada expressly recognized false light invasion of privacy as a valid and separate cause of action in 2014. *See Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125, 141 (Nev.), *reh’g denied* (Nov. 25, 2014), *petition for cert. filed* (Mar. 25, 2015) (“[W]e, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three privacy causes of action that this court has adopted.”).

The court clarified that, under Nevada law, defamation law seeks to protect an objective interest in one’s reputation—either economic, political, or personal—in the outside world. *Id.* (citations omitted). Conversely, false light invasion of privacy protects one’s subjective interest in freedom from injury to the person’s right to be left alone. *Id.* (citations omitted). For example, situations such as being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute, may place a person in a harmful false light without rising to the level of defamation. *Id.* (citations omitted).

1 In Nevada “the injury in privacy actions is mental distress from having been exposed to
 2 public view, while the injury in defamation actions is damage to reputation.” *Flowers v. Carville*,
 3 310 F.3d 1118, 1132 (9th Cir. 2002) (citation omitted). Like defamation, false light requires actual
 4 malice. *Id.* However, courts place less emphasis on public reputation in the false light tort than in
 5 defamation. *Id.* The thrust of a false light action is the subjective “privacy” of the subject. *Id.*
 6 False light also requires an implicit false statement of objective fact. *Id.*

7 As previously discussed in the defamation analysis, plaintiffs have failed to allege that their
 8 rifle scopes were legitimate and not counterfeit. Thus, plaintiffs failed to state sufficient facts to
 9 support their allegation that defendants statements were false to withstand a motion to dismiss.

10 Accordingly, defendants’ motion to dismiss will be granted as to this claim.

11 **L. Wrongful interference with prospective economic advantage**

12 Plaintiffs allege that defendants were aware of plaintiffs’ business relations with certain
 13 customers. (ECF No. 20 at 20). Further, plaintiffs allege that defendants were aware that
 14 plaintiffs’ potential and existing customers would be at the Las Vegas gun show. (ECF No. 20 at
 15 20). Plaintiffs thus assert that defendants intended to interfere with their potential economic
 16 advantages with those customers. (ECF No. 20 at 20).

17 To establish a claim of wrongful interference with a prospective economic advantage, a
 18 plaintiff must show five elements:

19 1) a prospective contractual relationship between the plaintiff and a third party; 2)
 20 the defendant’s knowledge of this prospective relationship; 3) the intent to harm
 21 the plaintiff by preventing the relationship; 4) the absence of privilege or
 justification by the defendant; and, 5) actual harm to the plaintiff as a result of the
 defendant’s conduct.

22 *Leavitt v. Leisure Sports Inc.*, 734 P.2d 1221, 1225–26 (Nev. 1987).

23 Here, plaintiffs have failed to sufficiently state a claim for wrongful interference with
 24 prospective economic advantages. Specifically, plaintiffs have failed to allege that defendants
 25 intended to harm plaintiffs by preventing the prospective relationship or that defendants lacked a
 26 justification. Further, plaintiffs have failed to allege actual harm as a result of defendants’ conduct.

27 Accordingly, defendants’ motion to dismiss will be granted as to this claim.

28 . . .

1 **M. *Respondeat superior* liability of Leapers**

2 “[R]espondeat superior liability attaches only when the employee is under the control of
3 the employer and when the act is within the scope of employment.” *Molino v. Asher*, 618 P.2d
4 878, 879 (Nev. 1980). Under *respondeat superior*, an employer may be held liable for both
5 negligent and intentional acts of employees. *See, e.g., Busch v. Flangas*, 837 P.2d 438, 440 (Nev.
6 1992) (negligence); *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1180 (Nev. 1996)
7 (intentional tort); *see also Switzer v. Rivera*, 174 F. Supp. 2d 1097, 1106 (D. Nev. 2001).

8 However, *respondeat superior* is a theory of attributing liability, and is not itself a stand-
9 alone claim for relief. Additionally, § 1983 does not permit *respondeat superior* liability. *See*
10 *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) (rejecting the concept of *respondeat*
11 *superior* liability in the § 1983 context and requiring individual liability for the constitutional
12 violation).

13 As plaintiffs failed to state a claim for negligence or any intentional tort against defendants,
14 defendants’ motion to dismiss will be granted as to this claim.

15 **IV. Conclusion**

16 Accordingly,

17 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants Continental
18 Incorporated, Inc.’s and Leapers, Inc.’s motion to dismiss (ECF No. 24) be, and the same hereby
19 is, GRANTED.

20 IT IS FURTHER ORDERED that plaintiffs’ amended complaint (ECF No. 20) be, and the
21 same hereby is, DISMISSED WITHOUT PREJUDICE.

22 DATED October 11, 2016.

23 
24 UNITED STATES DISTRICT JUDGE